

2-04 MPT - Example 1

BRIEF

STATEMENT OF FACTS

Defendant Tom Miller Jan Adams began a relationship in June 2001. On or about July 4, 2001, the defendant intentionally pushed Ms. Adams with sufficient force to knock her to the ground. Ms. Adams did not report this incident. Despite the first incident of abuse, the relationship quickly evolved into cohabitation. The defendant and Ms. Adams lived together for almost a year. They shared expenses and responsibility for the lease. They intended to move to a new apartment in October of 2002; they jointly placed a security deposit and obtained keys for an apartment in Fairfield City.

Just prior to moving to Fairfield, the defendant assaulted Jan Adam's child on Sept. 21, 2002. The child, who was six years old at the time, had been ill. The defendant told the child to "shut up" and pushed her into the wall when she objected to being called "whiny." At that time, Ms. Adams called the police and demanded that the defendant move out.

Unfortunately, the defendant did not surrender the key he had procured to Ms. Adam's new apartment. On Feb. 12, 2003, the defendant entered Ms. Adam's apartment without her consent. He tried to force her to drop the charges against him for the assault on her child. When Ms. Adams told the defendant that she had no control over the charges, the defedant attacked her. He pushed her into the wall, stuck his finger in her eye, slapped her fact, and choked her. When he finally left. After Ms. Adams had spoken with the police, the defendant threw a rock through her living room window. Ms. Adams had seen the defendant driving away after the rock had been thrown.

The defendant again assaulted Ms. Adams on October 29, 2003. He entered her apartment without consent and harassed her about her relationship with her ex-husband. The defendant forced Ms. Adams to call her ex-husband and the defendant harassed and threatened him also. At this time, the defendant also threatened her life and the life of her daughter.

Finally, on November 5, 2003, the defendant came to Ms. Adam's apartment in the middle of the night. He was not able to get in because the locks had been changed. He began pounding on the door and threatening Ms. Adams to induce her to let him in. After the apartment manager had forced the defendant to leave, he left a number of threatening phone messages on Ms. Adams's answering machine.

ARGUMENT

THE PRIOR INCIDENTS CONSTITUTE DOMESTIC VIOLENCE UNDER FRANKLIN PENAL CODE SEC. 501 AND, THEREFORE, FRANKLIN RULE OF EVIDENCE 418 APPLIES.

Under Franklin Rule of Evidence 501(a), "abuse" is defined as "intentionally or recklessly causing or attempting to cause" injury. Frank. R. Evid. 501(a). It also includes "placing a person in reasonable apprehension of imminent serious bodily injury." The facts are undisputed that the defendant acted intentionally. In fact, the facts show that not only did he intentionally act by physical violence, but that his threats were intended to place Ms. Adams in fear of imminent serious bodily injury.

Under Franklin Rule of Evidence 501(b), "domestic violence" is defined as "abuse committed by an individual against an adult who is a cohabitant [or a] former cohabitant" or "has had a dating . . . relationship." Frank. R. Evid. 501(b). The evidence shows that all of the prior incidents should be classified as domestic violence.

First, the assault on Jan Adams on or about July 4, 2001 occurred when the parties were dating. The couple met in mid-June of 2001 and had been dating since that time. Thus, when the defendant pushed Ms. Adams to the ground, it was an act of domestic violence.

Second, the evidence is undisputed that Miller and Ms. Adams were former cohabitants. There are a number of factors that help determine whether persons have cohabited. The first factor is sexual relations; persons having sexual relations while sharing the same living quarters can establish cohabitation. Second, the sharing of income or expenses shows cohabitation. Third, joint use of property indicates a cohabitive relationship. Other factors include the parties' holding themselves out to the community as husband and wife, continuity of the relationship, and the length of the relationship. The defendant and Ms. Miller began living together in mid-2001. Their relationship was intimate and they shared expenses. Although they did not hold themselves out to be married in the community, it is likely that the public perceived their living together with a child as indicative of cohabitation. Therefore, the assault on Ms. Adams on Feb. 12 constitutes domestic violence.

The assault on Sara, Ms. Adams child does not fit the strict definition of domestic violence. However, Ms. Adams was present when the assault occurred. Presence of a parent in this situation should be construed as acting against the parent as well as the child.

EACH PRIOR INCIDENT CONSTITUTES ADMISSIBLE CHARACTER EVIDENCE UNDER FRANKLIN RULE OF EVIDENCE 404B

The prior incidents are admissible under Rule 404(B) because they show intent, common plan, and absence of mistake or accident. First, the defendant's actions should be viewed in their entirety to fully

understand the common plan of harassment that he has inflicted on Ms. Adams.

The defendant has consistently and intentionally embarked on a continual harassment of Ms. Adams. These prior incidents must be admissible to prove the scope of the defendant's common plan.

For example, the defendant has proposed that the rock may have been thrown by Ms. Adam's ex-husband. However, this theory is disputed because the defendant acted intentionally on each incident, attempting to coerce Ms. Adams into rescinding the charges.

UNDER FRANKLIN RULE OF EVIDENCE 403, THE COURT SHOULD FIND THAT THE PRIOR INCIDENTS WILL NOT CONUSE, MISLEAD, DISTRACT, OR UNLDULY PREJUDICE THE JURY.

The Franklin Court of Appeal stated that there are a number of factors that must be balanced in determining wether prior acts are too prejudicial. Those factors include: "(1) an examination of the nature, relevance, and possible remoteness of each such offense; (2) the degree of certainty of its commission; (3) the burden on the defendant defending against the uncharged offense; (4) the likelihood of confusing, misleading or distracting the jurors from their main inquiry; and (5) its likely prejudicial impact on the jurors." *State v. Beck*, Frank. Ct. Ap. (2002).

In the present case, the concerns are almost identical to the concerns faced by the court of appeals. In *Beck*, the appellate court held that where "past instances . . . [are] very similar to and [are] no more egregious than the charged offense, . . . there is little reason to believe that the jury will be confused, misled, distracted, or unduly prejudiced by [the] evidence." *Id.*

Here, this court should balance in favor of the victim and society, not in favor of the defedant. Rule 418 allows such incidents to be introduced. The evidence is not more prejudicial than probative. Therefore, this court should allow the evidence to be admissible.

2-04 MPT - Example 2

Statement of Facts:

Jan Adams met Tom Miller (defendant) met in June 2001. Soon thereafter they began living together, were intimate, for over 1 year (until September 2002.) Jan was planning to move, from the apartment that she shared the lease with Defendant, into a new apartment, also with Defendant. But Jan broke up with Defendant before the move. Jan shared expenses with Defendant, and even shared a security deposit on the new apartment, but after Sept. 2002 Defendant no longer lived with Jan (even though he did have a key). The cause for the break up was Defendant's abusive actions toward Jan's little six year old girl Sara, who was child of a former marriage. When Defendant shoved Sara into a wall after yelling at her to stop being a whiner just because she felt sick, Jan had had enough and left Defendant.

In 2/03 Defendant entered Jan's new apartment without permission, using the key that was never returned to Jan. It was at this time that he threatened Jan and slapped her, threatened her ex-husband Charles because he thought Jan was "cheating" on him with Charles, and he threatened to kill Jan and Sara if Jan called the police about this incident on 2/12/03. Jan, frightened for her life and life of Sara had the locks changed. This did nothing but anger Defendant and he threw rocks through windows in an attempt to get into the apartment to scare Jan. Defendant has been convicted of the acts toward Jan on 2/12/03, and Sara on 9/21/02. Jan has filed aggravated assault charges against Defendant based on domestic violence again against Jan on 10/29/03 and 11/5/03. Jan wishes to admit evidence of her prior abuse from Defendant.

1. All of the evidence of Defendant's prior acts is admissible. Defendant committed acts of domestic violence (FPC 501) on several occasions when he intentionally caused Jan bodily harm and reasonable apprehension of bodily harm (abuse as defined by FPC 501(a).

Domestic violence is abuse committed against an adult cohabitant or former cohabitant. A cohabitant is when 2 unrelated adults live together for substantial time.

In this case, Jan is an adult who is unrelated to Defendant and they lived together for over 1 year. Additionally Jan and Defendant were intimate (has sexual relations), shared living expenses, were both named on the lease for over 1 year and they have continued contact for 3 years now, although more at the behest of Defendant.

Thus, Defendant abused Jan, a former cohabitant, and his prior act are acts of domestic violence and FRE 418B will apply and permit prior acts of domestic violence to enter evidence despite the rule in 404.

Defendant may argue that aggravated assault is improper charge here because he did not cause serious bodily injury or exhibit extreme indifference to the value of human life (FPC 211(a)) nor did he attempt to harm Jan or Sara with a deadly weapon (211(b)).

It is possible that Defendant's throwing of rocks through the windows constitutes a knowing/purposeful attempt to harm another with a deadly weapon. But in any case, Defendant is absolutely liable for assault for throwing the rock and pushing and hitting Jan and Sara.

2. Each prior act is admissible under FRE 404A because FRE 418B permits, in a criminal action,

including domestic violence, evidence of Defendant's prior domestic violence. Rule 404 does not make such evidence inadmissible because Defendant's prior act were of domestic violence as described in (1).

In this case, Defendant is accused of domestic violence (abuse of a former cohabitant) on 10/29/03 and 11/05/03. Therefore, any prior acts of domestic violence are admissible. Defendant was convicted of his abuse of Jan on 2/12/03, and he pushed Jan to the ground in 7/4/01 in front of several witnesses. Defendant's conviction will be admissible, but his act on 7/4/01 probably will not be. This act occurred before Jan and Defendant lived together so it is not domestic violence. However, the abuse on 2/12/03 will still come in.

Additionally, Defendant's abuse of Sara will not be admitted because it is not domestic violence. It is not abuse of adult cohabitant, or emancipated minor.

However, these acts may still be admitted if used to show Defendant intended to hurt Jan on 10/29 and 11/5/03, or show a motive, or lack of accident (Grubb and 404B).

3. The other acts of non domestic violence should not be excluded because their probative value outweighs their prejudicial effect.

Under (Beck) the court may exclude evidence that is admissible under 404B if its probative value is substantially outweighed by its prejudicial effect. The court will weigh 5 factors to make this determination, and the court should find that the act's probative value is high here with little risk of prejudicial effect.

First, weigh the similarity and remoteness of the prior acts.

In this case, all of the acts of Defendant have been in the last 2 years and are very similar. Pushing, shoving Jan & Sara, hitting Jan, slapping and poking Jan. All of this is similar conduct.

Secondly look at the degree of certainty of the act.

In this case Defendant was convicted of abuse of Jan, 2/12/03, and Sara, 9/21/02, so this is very certain. Witnesses saw Defendant push Jan on 7/4/01 so certainty is clear here as well.

Third, look at the burden on Defendant to defend against uncharged offense.

In this case it is high, but witnesses saw it so he is not prejudiced by a unsubstantiated claim by Jan. Fourth and Fifth, look to see if there is likely jury confusion or prejudicial impact.

In this case there is little confusion and little prejudice. So allow all under 404B b/c no outweighed by prejudicial effect.

2-04 MPT - Example 3

Statement of Facts

Defendant, Tom Miller (Miller), is charged with two counts of aggravated assault, which involve domestic violence against Jan Adams (Adams).

Adams & Miller met in June of 2001. They quickly developed an intimate, close, personal relationship. In fact, the couple, together with Adam's daughter, Sara, moved in together almost immediately – Miller was added to Adam's lease and the two shared expenses for their living arrangement until the end of September 2002.

The relationship, however, was a rocky one to say the least. Shortly after the couple moved in together, on the 4th of July 2001, the two went out on a date with friends. One of the persons in attendance made a reference to Adams past relationship with a man named Charles (Sara's father). In response, Miller erupted, and pushed Adams to the ground.

There was a brief period without incident, but trouble began again in September of 2001. That month, the couple had planned to move together to a new apartment. They found the apartment together, jointly paid the security deposit and each received keys. But, on September 21, 2002, Miller's temper flared again. This time, he yelled at Adam's then ill daughter and shoved her against a wall. Miller resented Sara because she reminded him of Adams' ex-boyfriend, Charles, and apparently took out his anger at Adams for the relationship on Sara. Fearing for her safety and that of her daughter, Adams told Miller to get out & called the police. Miller was charged and convicted for the assault.

In October 2002, Adams and Sara moved to the apartment Miller had selected and paid for with them. Although Miller did not move with them, he retained his key to the apartment.

On February 12, 2003, Miller showed up at the apartment. He pushed Adams, stuck his finger in her eye, hit and choked her. Shortly after Miller left, a rock was thrown through the living room window. Adams looked out and saw Miller fleeing the scene.

On October 29, 2003, Adams showed up at the new apartment – again enraged. He let himself in with his key, came into Adam's bedroom & began swearing and yelling at her, accusing her of speaking with Sara's father. He threatened her and her daughter – saying he would kill them both if Adam's called the police. He also slapped Adams so hard her head hit the wall. This incident is one of the two giving rise to the present suit.

Finally, on November 5, 2003, less than a week later, Miller returned – acting violently. He repeatedly pounded on the door and window, screamed, and left threatening messages – threatening both Adams and Sara. Although he denies having thrown it, a rock shattered the window in Sara's room and Adams saw Miller standing outside. This incident is the 2nd incident charged.

Pursuant to FRE418E, Miller was provided notice of the intent to introduce evidence of the incidents on February 12, 2003, 9/21/02 and 7/14/01 in the present action. This brief responds to his objections. For the reasons stated herein, these objections should be overruled.

Argument

1. Mr. Miller's prior conduct - injuring & threatening Sara & Adams while living together - constitutes domestic violence pursuant to FPC 501.

FPC §501 defines domestic violence, in relevant part as (1) abuse by an individual (2) against a cohabitant. These elements are present here.

First, abuse is defined as intentional/reckless causing or attempting to cause bodily injury or reasonable apprehension of imminent harm. In each of the instances, Miller physically injured Adams or Sara and did so intentionally. He may argue that the assault against Sara was not against Adams, but on that occasion, the facts clearly show that his act against Sara was intended to – and did – cause Adams to fear for her own safety as well.

Second, Adams and Miller were cohabitants in that they lived together for a year, resulting in some permanency of the relationship. In fact, Miller even told Adams in November 2003, “You’re my woman until I say so.” Moreover, other factors relevant for showing cohabitation – sexual relations, sharing of living quarters, income or expenses, joint use of property, and continuity and length of relationship (FPC 501) also indicate cohabitation. As stated, the parties had a long relationship, lived together for a year, and were intimate.

Thus, the prior incidents are domestic violence and this objection is meritless.

2. Mr. Miller's prior incidents are admissible both to show conformity (because of FRE 418) and for other purposes because he has denied throwing the rock.

First, FRE 418B renders FRE 404 inapplicable to exclude evidence of prior incidents of domestic violence in criminal cases involving domestic violence. That is the case here. As stated above, Miller's prior acts are domestic violence and he has been charged with such a crime here, thus, rule 404's general prohibition on introduction of past conduct does not apply in this case.

Second, the past incidents here are relevant to prove other purposes, such as proof of motive, opportunity, intent, preparation, common plea, identity or absence of mistake. These other purposes are expressly permitted by FRE 404B.

The Supreme Court's decision in State v. Grubb is instructive on this point. There, the court held that where a defendant had denied committing the alleged acts, he put at issue intent and absence of accident. Accordingly, the court held that prior incidents were admissible, pursuant to 404B, for these purposes. So it is here. Miller denies all of the alleged conduct, including the throwing of a rock through Sara's window. His prior – very similar – conduct is relevant to prove these points and admissible for these purposes per Grubb and Rule 404B.

3. The probative value of the evidence here is not outweighed by prejudice because Miller has already been convicted of two of the incidents, the burden to him is slight and the evidence is highly relevant and not likely to mislead the jury.

Miller's final objection is made pursuant to FRE 403. He contends the evidence is unduly prejudicial and asks the Court, in its discretion to exclude the evidence. While the court does have discretion on

this point, exclusion would be improper here.

In determining this question, the Court should consider (1) the nature, relevance and recency of the incidents, (2) the degree of certainty of its commission, (3) the burden on the defendant against an uncharged offense (4) the likelihood of misleading the jurors and (5) any likely prejudicial effect. See State v. Beck. The unique facts and issues of the particular case should be considered. Id.

Here, the incidents occurred as recently as one week before the last charged incident and, given the similarities of the incidents are highly relevant. While some occurred earlier, there is a clear pattern here, and all incidents occurred within a couple of years. Moreover, Miller has already been convicted of 2 of the three instances at issue, so the burden to defend against the final incident is slight. Additionally, the incidents were no more egregious than the charged offenses, thus any likelihood of undue prejudice is slight.

Thus, the incidents are not unduly prejudicial and the evidence should come in.